be any greater in those western states claiming ownership of the water by their constitutions, for it does not appear that they could establish property rights in the water any more than they could in the land in the absence of a special grant by the United States.

THE EFFECT OF INSANITY UPON CONTRACTUAL POWERS.—The rights and obligations created by a contract, one of the parties to which was insane at the time of its making, was raised in a recent case in Alabama. The payee of a promissory note after becoming insane transferred it to the plaintiff. In a suit against the maker it was held for the defendant on the ground that the plaintiff had no interest therein, an insane person being incapable of making a contract. *Walker* v. *Winn* (1905) 39 So. 12.

This view recognizing the necessity of mental capacity in the creation of a contract, is logically unimpeachable and has been followed in some jurisdictions in this country. *Dexter* v. *Hall* (1872) 15 Wall. 9; *Ger. S. & L. Soc.* v. *DeLashmutt* (1895) 67 Fed. 399; *Van Deusen* v. *Sweet* (1873) 51 N. Y. 378; *Farley* v. *Parker* (1876) 6 Ore. 105; *Eider* v. *Schumacher* (1893) 18 Colo. 433. The weight of authority in this country, however, is undoubtedly in favor of the position that contracts made by an insane person before formal adjudication of insanity, are merely voidable and are binding upon the parties until the insane person or his representative takes steps to disaffirm them. Parsons on Contracts, 8th ed., 422–3.

The American jurisdictions in adopting this position have disregarded entirely the rule of the common law to the effect that the deed of a person non compos was void. *Thompson* v. *Leach* (1697) 3 Salk. 300; *Yates* v. *Bowen* (1739) 2 Strange 1104. On the other hand they have extended the holding that the effeofment of an insane person was voidable rather than void, *Beverley's Case* (1602) 4 Co. 123b, first to deeds, *Allis* v. *Billings* (Mass. 1843) 6 Metc. 415, and thence to contracts in general. *Carrier* v. *Sears* (Mass. 1862) 4 Allen 336. A statement in 2 Black Comm. 291 has been supposed to support this view but has been severely criticised. 2 Sugden on Powers, 6th ed., 195. The fact that the essence of the old act of feoffment lay in the symbolic divestiture and transfer of seisin by physical act and that no question of mental capacity was involved, would seem to account for the distinction made by the common law between the deeds and the enfeoffments of one insane. The effort to apply this conclusion to the deeds of to-day, having regard to the modern conception of the function of a seal, would seem indefensible. In re *De Silver* (Pa. 1835) 5 Rawle 110.

A common resort of the courts in seeking support for the illogical position under consideration is to insist upon the analogy between the contracts of infants and those of insane persons on the basis that both are wanting in capacity to make a binding contract. Lord Mansfield in *Zouch* v. *Parsons* (1765) 3 Burr. 1794, 1807, repudiated this analogy and its later pursuit has led the courts into many inaccuracies. 4 COLUMBIA LAW REVIEW 433. An infant may have the mental capacity to contract and his contracts are held voidable, not because he has no mind, as is the case with one insane, but for the protection which the law presumes him to need. *Robinson* v. *Weeks* (1868) 56 Me. 102, 107. See the dissenting opinion of Cole, J., in

Allen v. *Berryhill* (1869) 27 Ia. 534, 551, for an excellent discussion of this point.

Probably the chief explanation of the prevalence of this anomalous doctrine that insanity does not absolutely destroy the contractual powers, is to be found in the frequent confusion of contractual with quasi-contractual principles. The decisions commonly notice the absence of a mind necessary to contract but find it expedient to hold the insane person bound at least by a voidable contract, for the protection of the other party. *Eaton* v. *Eaton* (1874) 37 N. J. L. 109; *Flack* v. *Gottschalk* (1898) 88 Md. 368, 375. The natural inference is that the court has in mind, not a real contract, but an obligation imposed by the law although enforced in a contract action, *Pearl* v. *M'Dowell* (Ky. 1830) 3 Marsh. 659, 662, and the measure of recovery in such a case should be determined not by the terms of the contract, but by the benefit received by the other party. Further evidence of the consideration by the courts of the equitable principle of unjust enrichment in thus granting a recovery upon the contract is to be found in the rule commonly recognized, Page on Contracts § 901 and cases cited, that the contract will not be held binding on the non compos mentis provided he can put the adverse party in statu quo by restoring to him the consideration received or its equivalent.

RIGHT OF A SPECIAL DEPOSITOR TO A PRIORITY.—It is one of the duties of a trustee of an express trust to keep the trust fund separate and distinct from his own personal funds. *Bemmerly* v. *Woodward* (1899) 124 Cal. 568. Where he has mingled the funds and thereafter become bankrupt, the early rule in equity forced the cestui to come in with the trustee's general creditors on the ground that the identity of the res had been lost. *Ex parte Dale & Co.* (1879) 11 Ch. Div. 772 and authorities cited. In order, however, that the trustee might not by his own wrong deprive the cestui of his priority, equity came to recognize in the cestui a new right, an equitable charge in the mingled funds. *Knatchbull* v. *Hallett* (1879) 13 Ch. Div. 696, 708–721; *Nat. Bank* v. *Ins. Co.* (1881) 104 U. S. 54, 68–70. But a person who gives another money which by the agreement is to be mingled with the other's personal funds has no intention to create a trust. The necessity of an intention to create and maintain a separate fund in order to constitute a trust seems to have been disregarded in the dictum of a recent case in the federal court. A deposited a check "for collection" with the B bank who forwarded to the C bank "for collection." The C bank collected and remitted by its own draft on a New York bank. The C bank then became insolvent and by order of its receiver, payment on the draft was refused. It was held *inter alia* that the C bank continued under a trust obligation to A, although there might be a uniform custom among banks to remit the proceeds of checks sent them for collection by their own drafts; the intention of the parties being nevertheless that the special depositor should not be a mere creditor. *Holder* v. *Western German Bank* (C. C. A. 6th C. 1905) 136 Fed. 90. If there was no authority to mingle, *Knatchbull* v. *Hallett*, supra, is in point. If there was such authority, the depositor's preference cannot be based on trust principles. *Farley* v. *Turner* (1857) 26 L. J. Ch. 710; *Montagu* v. *Pac. Bank* (1897) 81 Fed. 602; *City of St. Louis* v. *Johnson* (U. S.